

Novel 136.

Concerning contracts of money changers (bankers).
(De argentoriorum contractibus.)

The same Augustus (Justinina) to Strategius, count of
the State Finance.

Preface. The members of the guild of bankers of this fortunate city have supplicated us on many subjects, asking our aid, saying that they are of benefit to many, by reason of which they enter into obligations of suretyship^(a), and of loans, full of danger; that there exists our imperial constitution which provides that collections (of debts) shall be made in a certain order, namely that the principal debtors and their property shall be first pursued, and the sureties^(b) thereafter; but that their guild does not have the benefit of this law, whereby they suffer grievously, inasmuch as they themselves are not able to enjoy the benefit thereof, but may be sued immediately; when they, on the other hand, receive obligations of suretyship, the sureties do not pay them immediately; and that it is just that they either should equally enjoy the benefit of the general law or that our constitution should not operate to their detriment.

(a) Constitutae pecuniae.

(b) Fidejussores et madatores et constitutae pecuniae rei.

c. 1. We therefore ordain, that if a banker loans money to another and receives a surety^(a), and the constitution (aforesaid) and order of payment is set up (as a defense) against them, the constitution shall be in force as against them, unless a special pact has been entered into whereby the creditor is permitted to sue the principal debtor as well as the mandator or surety without awaiting the order fixed by the constitution. Because of the ser-

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vice of bankers, rendered by them for the common good in connection with contracts, we permit such pacts to be made, inasmuch as they are not contrary to law, since anyone may waive the benefit granted him by law. If such pact is made, bankers may in the beginning sue the mandator, surety and other persons; provided that if such pact is not in writing, the constitution is in force as to them; but if the pact is in writing, the rule of the contract governs and suits may be brought accordingly.

Notes.

(a) Constitutate pecuniae obligationem vel fidejussores vel mandatores.

The suretyship mentioned in the foregoing chapter of this Novel, refers generally to a surety by mandate, by stipulation, and by acceptance of another's debt. The banker became surety by mandate, when, for example, one in Rome issued a bill of exchange to be paid at Athens; he became surety by agreement to pay another's debt, generally called constitutum, when a banker accepted a bill of exchange. The suretyship by stipulation might be used in either case, or in other transactions. The constitution fixing the order in which debtors might be sued is Nov. 4, c.1, attached to C. 8,40,29, which excepted bankers. This Novel eliminates the inequality in cases when a pact was entered into as shown by next chapter.

c. 2. Their second objection is another exception which we have recently made^(a) in case a manager of a bank has acquired a position in the imperial service for himself or his children: namely, that in such case his children having such position shall not be able to set up that it was acquired with money from their father or with money acquired otherwise, but that (it shall be presumed) that it was acquired with money of the creditors. Now they have

Novel 136, c.2, cont'd.

asked either that such presumption should not apply to them, or that they should also have the benefit thereof, so that if a man has received a loan from them and he or his children have a position in the imperial service, and the debt cannot be paid in any other way, it should be satisfied by sale of the position which he or his children have. Now we did not make that law unconditional, but with a suitable exception; nor do we permit it to be overturned easily, but ordain that the imperial constitution and the presumption therein applied to them shall remain in force, since they, having contracts with many, do not do everything with their own money; they, however, shall enjoy the same privilege, so that if a man has a position in the imperial service for himself or his children, it shall be held bound (for the debt), provided it is one of the positions which may be sold; the same shall be true with such position held by the children, unless it can be clearly shown by them that they obtained it either with property derived from their mother or through imperial bounty.^(b) If the debt cannot be satisfied otherwise, the manager of banks for whose benefit we enact this law - offsetting the presumption of the foregoing constitution - shall be paid by (the sale of) such position of the children.^(c) And as the foregoing constitution applies the aforesaid presumption against them, so we give the offsetting remedy only to the members of the aforesaid guild on account of the common benefit which they render in connection with contracts, incurring many perils to relieve the necessities of others.

(a) C. 8,13,27.

(b) Or from some source other than the father. Annotation to Bas. 23,4, Nov. 136,c.2.

(c) And, of course, by the sale of the position held by the banker himself.

c. 3. They also state upon just grounds that if they lend or have lent money to someone for the purchase of movable or immovable property, and have given a definite amount of money, and property is acquired with the money so lent, they should have a superior right in such property without having to suffer any diminution therein; and if they show that such property has been bought with their money and that the debtor cannot pay them in any other way, the property itself, so bought with their money, should be turned over to them as though it had been bought by themselves and as though the actual purchaser was such only in name. It would not be just that those who advance their money should not have a first right, and a right that is beyond question, in the property purchased, if mention of hypothecation is made in the written contract. If that is done, they will have all the rights asked of us. And they shall have even greater rights than they ask, for we grant them superior rights (at all events) over all, in the property that is shown to have been bought with their money. If the contract is not in writing and they give property - which latter is often done by managers of banks, giving or selling ornaments or silver in such cases - and they do not receive the purchase price, they may reclaim it as their own, though they have no hypothecation. Parties who do not pay the purchase money shall not possess the property of others and groundlessly retain what has been advanced by others. If they leave heirs, such heirs shall restore the property itself that was given, or its value; if they leave no heirs, the bankers may reclaim the property, and no hypothecation obtained by others therein shall avail against them.

Note.

Special rights are granted by this chapter to bankers. They received an implied lien on the property bought with their money, which was not generally true, except in the case of manors. See Notes to C. 8,13,16 and 17, and reference there given.

c.4. Since we enacted a law^(a) that superintendants of bankers should not loan money at more than eight per cent per annum, and they have shown us that they are accustomed to make loans without a contract in writing, but that good faith as to the interest is not observed, on the pretense that the contract is not in writing and without stipulation^(b) - as it is commonly said that interest is not payable without stipulation, although there are many cases in which it accrues without stipulation and under a mere pact^(c); nay, sometimes it accrues even without a pact, and arises and may be collected by reason of the circumstances of the case^(d) - so we enact that interest shall arise not merely out of a stipulation, but also pursuant to a contract not in writing to the extent that the law permits them to stipulate, that is to say, to the extent of eight per cent per annum. For it would not be right that those who are ready to assist almost all of those who are in need of assistance should be wronged by any such technicality.

(a) C. 4,32,26.

(b) C. 4,32,3; D. 19,5,24.

(c) C. 4,32,1; D. 22,1,30; D. 22,3,7.

(d) C. 5,12,2; D. 22,1,1.

c. 5. They (the bankers) have also shown us that some parties that make a contract with them execute documents or statements of account, executing some of them as public documents in the forum (before a notary), writing others with their own hand, and again subscribing others that are written by third parties; and they (the bankers) ask us that if such writings are executed by the parties who make contracts with them, they should be held liable thereunder and should make satisfaction to them; that they should not be permitted to commit a wrong, saying, that though they have written documents, due-bills or statements of account with their

own hand, or have signed such as were written by others, the amounts mentioned therein were not in fact paid to them; that they (the bankers) should have a lien by reason of such amounts and should receive, though not stated, eight per cent interest thereon. Since this is a matter of common interest and is in need of much consideration, we answer as is proper. So if a man executes a public document (stating that he has received an amount of money) and writes the whole of it in his own hand, or subscribes a document or a statement of account written by others, he and his heirs shall at all events be liable thereunder in a personal action. But we do not rashly give a lien to those who have no contract therefor, unless it is shown that mention of the property is made in the writing, whereby the obligors either give a pledge or simply add "at the peril of my property," or make or write some other statement which indicates that a lien was contemplated. In such case we give them (the bankers) a lien, and neither thereby disturb the general nature of our laws, nor withhold from them the aid which we are able to give. 1. If a definite amount of interest has been contracted for, the contract prevails. If it is merely stated that a loan has been made on interest, the contracting parties cannot say that the money draws no interest, because the interest has not been specified, but through a presumption, as though it had been expressly stated, eight per cent interest per annum may be collected. This applies in the future. As to accounts of the past, eight per cent interest per annum may be collected, though no mention of interest has been made; for it is clear that a loan by a manager of a bank is made on interest, since a man who himself pays interest, cannot loan it without interest. Hereafter bankers shall observe the provisions made for their benefit in the present law.

Note.

Two special privileges are given to bankers by this chapter.

The general rule was that a man who had given a due-bill had the right to set up a defense that the money stated to have been received was not in fact received. C. 4,30. The time within which that defense could be made was fixed by Justinian at two years. C. 4,30,14. The right to make such defense was by this section taken away from those who gave a due-bill or other document to bankers which acknowledged the receipt of the amount of money therein mentioned. See next section. Again this section gives the right to bankers to collect eight per cent interest per annum though no contract to that effect was made.

c. 6. We especially aid them in this: that if an account is shown which specifically states the different items for which the money therein mentioned has been advanced, and the borrower has subscribed the account, the latter, if he does this - although he has not subscribed each separate item, or has not executed a statement either in the form of a due-bill or in the form of a compromise or otherwise - shall not be entitled to demand proof of each separate item, except that he may tender an oath to the creditor or to his heirs. This only we permit him to do, and that solely within the time that the defense that the money was not paid is permitted to be set up (as in other cases). If that time has passed, we do not permit the creditor to be burdened even with an oath, as we have also generally provided in the laws - although even that (i.e. permitting the oath to be tendered) was hardly necessary; for how is one justified in believing that a man who makes a statement or an account in writing, is so senseless as to state that something has been given which was not in fact given.

Note.

This chapter is an extension of the right mentioned in the previous chapter, and further relates to the tender of an oath.

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This oath might be tendered to an adversary, to swear whether or not the allegations of the party tendering the oath were true. If the adversary stated in the affirmative, that ended his contentions; if the oath was in the negative, it was absolutely binding and could not thereafter be questioned. That is one of the peculiarities in the Roman law which is frequently mentioned in the Code. See index, Buckland, 628.

Epilogue. Your Glory and every other magistrate of our republic must zealously forever uphold this our will declared in this imperial law, and a penalty of ten pounds of gold (\$2160) will be imposed on those who violate these provisions or permit them to be violated.

Given April 1, 535.